Supreme Court, U.S.
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No. 07-222

# In The Supreme Court of the United States

**RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,**

*Petitioner,*

**v.**

**MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a Richmond Times Dispatch**
**and**
**NATIONAL LABOR RELATIONS BOARD,**

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit applied a different and non-statutory evidence standard of "rational basis" to uphold the National Labor Relations Board's ("Board") finding that the RNPA failed to bargain over the announced Christmas bonus cancellation, and concluding that Media General's unilateral cancellation of the annual bonus did not constitute an unfair labor practice? Whether the proper evidence standard is set forth in 29 U.S.C. § 160(e) and (f) stating: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive"? Was the Board's finding supported by "substantial evidence on the record considered as a whole"?

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## PETITION FOR A WRIT OF CERTIORARI

The Richmond Newspapers Professional Association ("RNPA") petitions that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fourth Circuit, decided on March 15, 2007. In pertinent part the decision affirms the finding of the National Labor Relations Board ("Board") that the RNPA failed to bargain over Media General's July 2001 cancellation of an annual holiday (Christmas) bonus, and that Media General's unilateral cancellation of the bonus was not an unfair labor practice. In so affirming the Board, the Fourth Circuit bypassed the statutory "substantial evidence on the record considered as a whole" standard, set forth in 29 U.S.C. 160(e) and (f), and applied a different and non-statutory "rational basis" standard to the Board's finding that the RNPA had failed to bargain over the announced Christmas bonus cancellation. The proper evidence standard is set forth in 290 U.S.C. § 160(e) and (f), providing in pertinent part:

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." Clear record evidence is that the RNPA bargained extensively over the Christmas bonus, and that the Board's finding to the contrary is the result of its mistaken reliance on different facts in another case in which the RNPA was not a party. The Court is squarely presented with a holding substituting a different, non-statutory evidence standard bearing upon the conclusiveness of Board factual findings, in place of the established and required statutory evidence standard.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is dated March 15, 2007. (App. A-3) The decision and order of the National Labor Relations Board is dated December 16, 2005. (App. A-15)

## JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was decided on March 15, 2007. (App. A-3) A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on May 16, 2007. (App. A-1) Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

## RELEVANT STATUTORY PROVISIONS INVOLVED

Petitions for review were filed with the Fourth Circuit by Media General and the RNPA pursuant to 29 U.S.C. §160(f), providing in pertinent part "... the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." The Board's cross-application for enforcement was filed pursuant to 29 U.S.C. §160 (e), providing substantially the same.

## STATEMENT OF THE CASE

The RNPA seeks reversal of that portion of the Fourth Circuit's decision holding that "there is a rational basis in the record for the Board's (App. A-11) conclusion that Media General did not violate its duty to bargain" over its unilateral cancellation of the annual employee holiday (Christmas) bonus. The bonus was a past practice and benefit that had been in effect for decades (App. A-7) and was therefore part of the employees' collective bargaining agreement. (App. A-10, 12)

The Fourth Circuit's decision involves a federal statutory question of high importance. The Fourth Circuit did not apply the statutory standard of review under 29 U.S.C. 160(e) and (f) providing that " ...The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive".

Instead, the Fourth Circuit utilized an amorphous, non-statutory, malleable standard of review. The Fourth Circuit's improper standard of whether the Board's decision has a "rational basis" eviscerates the statutory "substantial

evidence on the record as a whole" standard. The erroneous result is the holding that the Board had a "rational basis" in finding that the RNPA failed to request bargaining on the bonus issue, providing a "rational basis" for the NLRB's conclusion that Media General did not violate its duty to bargain. (App. A-13) The record as a whole clearly shows, however, that the RNPA not only requested bargaining on the annual holiday bonus cancellation issue, but that the two chief negotiators for Media General and the RNPA extensively negotiated over the issue. There is no substantial evidence in the record as a whole for the Board's conclusion that the RNPA failed to negotiate, but there is substantial evidence that Media General and the RNPA negotiated extensively over the holiday bonus during final telephone negotiations resulting in a new collective bargaining agreement. Contrary to the clear record, the Fourth Circuit finds:

"After declining Media General's initial offer to bargain, RNPA never asked for independent bargaining sessions to address the bonus issue". (App. A-13) The record contains testimony from Media General's chief

negotiator, James V. Meath, Esq. showing that the bonus was in fact extensively discussed and included in the final general negotiations over the new collective bargaining agreement. (JA 510-513) The Fourth Circuit is demonstrably wrong on the record as a whole in stating: "However, the contradictions in the record and the union's clear failure to request bargaining on the bonus issue provide a rational basis for the NLRB's conclusions that Media General did not violate its duty to bargain." (App. A-13)

The chief negotiators were James V. Meath, Esq. for Media General and Jay J. Levit, for the RNPA. (JA 134-135) Negotiations at the table ended August 9, 2001 (JA 134, 514), but resumed shortly thereafter by phone between Meath and Levit, and included extensive discussion of the holiday bonus. (JA 510-513), A new collective bargaining agreement was reached August 19, 2001. (JA 680, 709).

The new collective bargaining agreement includes an arbitration provision in Section XI (4)(b), recognizing past practice as the common law of the shop. (JA 696) Media General stipulated that the annual holiday bonus had been paid from 1960 through 2000. (JA 773)

The ALJ erroneously found that the RNPA sat on its rights and conditioned bargaining on receipt of financial information the ALJ determined was not necessary to provide to the union. The ALJ then found that Media General did not violate the Act when it unilaterally cancelled the annual holiday bonus. (JA 831) The Board affirmed the ALJ (on the Christmas bonus, see the Board's factually erroneous reason, penultimate paragraph in footnote 3, at App. A-17). The Fourth Circuit affirmed the Board, stating at page 15 of its decision **contrary to the clear record:**

"After declining Media General's initial offer to bargain, RNPA never asked for independent bargaining sessions to address the bonus issue. **The record contains testimony indicating that the bonuses may have been discussed during the general negotiations over the new collective bargaining agreement.** However, the contradictions in the record and the union's clear failure to request bargaining on the bonus issue provide a rational basis for the NLRB's conclusions that Media General did not violate its duty to bargain." (App. A-13) (bold type added)

The case at bar was decided by the Board on December 16, 2005. (App. A-15). The Board previously had decided a case involving the same employer but not the RNPA, and the same unilateral Christmas bonus cancellation. This earlier decision of the Board was decided on August 26, 2005, 345 NLRB No. 11(2005). This earlier case involved a different labor organization, and a different collective bargaining agreement. The labor organization is Local 40-N, GCIU. For convenient reference, the two cases respectively will be referred to as the "RNPA" case, and the "Local 40" case. The Local 40 case is found in the Addendum to Media General's opening Fourth Circuit brief, and is also found in the Addendum to the Fourth Circuit opening brief of the Richmond Newspapers Professional Association (RNPA).

FOOTNOTE 3 in the Board's RNPA decision (App. A-12) states the majority opinion's reliance on the Local 40 case as follows:

"As the **facts** and arguments relating to the claims raised regarding the cancellation of the holiday bonus are **substantially similar** to the **facts** in *Richmond Times-*

*Dispatch*, 345 NLRB NO. 11 (2005), we will not discuss those issues here, as that case is controlling on those issues. (Bold type added)

This reliance and conclusion by the Board is plainly wrong on the record as a whole in the case at bar. In the Local 40 case, the Board found that Local 40's President and negotiator, Valerie Irvin, had three times told Media General that Local 40 would likely meet to discuss the holiday bonus cancellation, and would contact Media General, but Local 40 had failed to meet on three occasions. See footnote 2 in the Board's Local 40 decision (345 NLRB No. 11). These facts in the Local 40 case of refusal to negotiate by Local 40 over the holiday bonus, are the **reverse** of the actual negotiation facts over the Christmas bonus that occurred extensively between the RNPA and Media General through their respective chief negotiators, Levit and Meath.

James V. Meath testified before the Administrative Law Judge in Meath's capacity as Media General's chief negotiator during talks for a new collective bargaining agreement. Meath was questioned by Jay J. Levit, who had

been the RNPA's chief negotiator. Meath testified that after the formal contract talks at the table had concluded on August 9, 2001, with no new contract having been reached, he and Levit continued the contract negotiations by telephone. These continued negotiations included resolution of the holiday (or Christmas) bonus cancellation issue. These negotiations resulted in Media General and RNPA reaching a new collective bargaining agreement within ten days after the last August 9 formal table negotiations, on August 19, 2001 (JA 680, 709) A pertinent portion of Meath's testimony before the ALJ follows (JA-510-513, bold type and underscoring added):

Q. So assuming that this happened, you certainly knew that you could talk to me [Levit] about it later on, didn't you?

A. I felt like I could always talk to you about whatever I needed to talk to you about.

Q. Including the Christmas bonus.

A. Any issue.

Q. As a matter of fact, after the [formal table] negotiations were over on **August 9th**, wages had not been finally

resolved, had they?

A. No.

Q. Sick leave had not been finally resolved had it?

A. Major issues.

Q. And you and I, you and Mr. Levit had **negotiating sessions,** just the two, **long distance** -- Mr. Levit was in Virginia Beach enjoying the sun. Long distance. You were at your lovely summer home on the river. Is that correct?

A. That is correct.

Q. And we discussed wages **long distance**, didn't we?

A. We did.

Q. And we discussed sick leave long distance, didn't we?

A. We did.

Q. And we discussed other things and **probably the** Christmas bonus too, didn't we?

A. No.

Q. No, we never -- And you never asked to discuss it, did you?

A. Neither did you.

Q. Well we had agreed on past practice before we broke [the formal table negotiations], hadn't we?

A. **I think we came to agreement on past practice. The arbitrator's duties and the arbitrator's authority, we did agree to that, yes.**

Q. You don't remember me telling you, Mr. Levit, telling Mr. Meath, Jim we bargained over the Christmas bonus. We agreed on past practice. That's a past practice.

A. Oh, I remember you saying that after you knew the company's position in the unfair labor practice charges. **We did have discussions. Absolutely.**

Q. **And we continued to have discussions on resolving the Christmas bonus, didn't we?**

A. **Oh, yes. We've had discussions on --**

Q. **Trying to resolve it.**

A. **Trying to resolve the entire case.**

Q. **Now, the Christmas bonus --**

A. **We had discussions of trying to resolve just about every aspect of this case over the course of --**

Q. **It included the Christmas bonus.**

A. **Yes.**

Q. **And we talked a lot about the Christmas bonus, trying to resolve it, haven't we?**

A. **I don't know if I'd say we've talked a lot, but we've talked frequently about it. Any time we have talked about this case we have talked about all the issues of this case including the Christmas bonus.**

Q. **And we talked about what I could take back to the RNPA if certain things were put in a proposal on the Christmas bonus.**

A. **We talked about that, yes.**

Q. **Yes, we did. Quite extensively, didn't we?**

A. **Yes.**

Q. Now, but the bottom line was your advice to me, that there couldn't be a resolution of the Christmas bonus because it was too company wide. Wasn't that the bottom line?

MR. TOWER: Your Honor, I'm going to object to any more questions about settlement negotiations that may have taken place long after –

**JUDGE ROSENSTEIN: I'll give him some**

**leeway. He was called to raise issue surrounding the Christmas bonus**. But again, see if you can bring it towards closure.

MR. LEVIT: Okay

Q. BY MR. LEVIT: Isn't that the message, didn't you finally tell me we just can't resolve the Christmas bonus because it's a company-wide thing?

A. No. That's not my recollection. My recollection

Q. Isn't that the truth?

A. No, it's not my recollection. It's not the truth as I know it. If you want my answer, my answer is that I came away from our discussions which I think **were good faith discussions** that we engaged in many times in many cases, **the fact that the real tension that was keeping us apart was the payment of the 2001 Christmas bonus**. It was an attempt to role the subsequent Christmas bonus in. That was the tension, was the payment of the 2001 Christmas bonus. **That's when I pretty much resolved in my own mind that I didn't think we were going to get there.**

Q. What you're testifying to –

A. **For the RNPA. Not for anybody else in the company.**"

In addition, unlike the Local 40 case, in the RNPA case Media General and the RNPA reached a new collective bargaining agreement on August 19, 2001. (JA 680, 709) Bearing in mind that the annual bonus was a plus 40-year past practice (JA 774), during the continuing and final telephone contract negotiations between Media General and the RNPA resulting in a new collective bargaining agreement, the parties included a new provision in that agreement recognizing the applicability of past practices. Paragraph (4)(b) in Section XI of the latest (Aug. 19, 2001) collective bargaining agreement provides (JA 696):

"(b) Interpretation of the provisions of this Agreement, which are applicable to the issue(s) presented to the arbitrator. Such jurisdiction shall not give the arbitrator authority to add to, subtract from, change or modify the provisions of this Agreement or to consider industry practice or custom. **The arbitrator may, however, consider the past practice of the parties or the common law of the parties' shop.**" (Bold type added.) (JA 696)

Media General and the Board assert that the RNPA refused to bargain over the bonus cancellation, but the record through Meath's testimony shows that the parties through their chief negotiators, Meath and Levit, bargained and negotiated extensively over the Christmas bonus by phone after the table negotiations ended. The parties did not reach agreement over the Christmas bonus. As Meath indicated in his testimony (JA 513, line 13) the non-union employees throughout Media General accepted the cancellation of the annual bonus, but not the RNPA represented employees. The bonus cancellation was company wide for both union and non-union employees, as noted by the Administrative Law Judge in Footnote 8 of his decision. (App. A-40) Media General never declared an impasse in bargaining over the bonus cancellation, which bargaining actually occurred extensively in the RNPA case between Media General and the RNPA through Meath and Levit, respectively, as the parties' chief negotiators.

The Holiday bonus was further incorporated during prior table negotiations into the broad past practice provision in paragraph (4)(b) in Section XI of the collective bargaining

agreement. (JA 696) The new CBA was reached through the final telephone negotiations of Meath and Levit on August 19, 2001. Even without this contractual provision, Supreme Court precedent establishes that the annual bonus past practice is as much a part of the collective bargaining agreement as if it were expressly written therein.

The Supreme Court has stated in Steelworkers v. Warrior and Gulf Navigation Company, 363 U.S. 574, 581-582(1960):

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as **the industrial common law- - the practices of the industry and the shop- - is equally a part of the collective bargaining agreement although not expressed in it."** (Bold type added.)

Because the Fourth Circuit and Board relied on critical facts from the Local 40 Case not in the record and contradicted by the record, and in doing so utilized a non-statutory "rational basis" standard, instead of the statutory substantial evidence considered on the record as a whole

standard, the Fourth Circuit committed reversible error on the Christmas bonus issue.

## REASONS FOR GRANTING THE PETITION

The Fourth Circuit in pertinent part affirms the Board's dismissal of the RNPA's claim that Media General committed an unfair labor practice in unilaterally canceling in July, 2001 the annual Christmas bonuses for employees. In so holding, the Fourth Circuit set forth its guiding standard: "We will uphold the NLRB's dismissal of a claim so long as there is a **rational basis** in the record for the Board's action." (Bold type added) (App. A-11) This is an amorphous, non-statutory and malleable standard.

It is noteworthy that the non-statutory standard used by the Fourth Circuit says only that the NLRB's Christmas bonus decision will be upheld "so long as there is a rational basis in the record for the Board's action." The Fourth Circuit does not say "so long as there is a rational basis in the record **considered as a whole** for the Board's action. "(App. A-11) This is significant because 29 U.S.C. § 160(e) and (f)

in pertinent part provides the applicable standard: "The findings of the Board with respect to questions of fact if supported by substantial evidence **on the record considered as a whole** shall be conclusive." (Bold type added) This is the required statutory standard. The Board's findings are conclusive if supported by substantial evidence based upon consideration of the record as a whole. 29 U.S.C. § 160(e). Substantial evidence must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" *Universal Camera Corp v. NLRB,* 340 U.S. 474, 477, 491 (1951).

Substantial evidence is defined as evidence that is sufficient to support the conclusion of a reasonable person. *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). *See Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 501 (1978) (same standard used to review the application of law to facts).

If the Fourth Circuit had reviewed the record as a whole, rather than relying on the partial record "rational

basis" non-statutory standard, it would have been compelled to conclude, on the record as a whole, and in light of the record testimony of Media General's chief negotiator, James V. Meath, Esq., that the RNPA had bargained with Media General over the Christmas bonus issue extensively. Further, the Fourth Circuit would have seen that Mr. Meath's testimony was compelling in this respect, and that his testimony concerned telephone negotiations that took place after August 9, 2001, the last day of formal table negotiations. The final telephone negotiations took place between the two chief negotiators, during the period August 10 to August 19, 2001, not only over the Christmas bonus issue, but over outstanding contract issues such as wages and sick pay as well.

The parties finally agreed upon a new contract effective August 19, 2001, but were unable to resolve the Christmas bonus issue. Media General never declared an impasse over the Christmas bonus issue, and unilaterally cancelled the annual Christmas bonus. The record shows that Media General and the RNPA during formal table

negotiations preceding the final telephone negotiations, agreed that an arbitrator could consider the past practices or common law of the shop. The Christmas bonus, an annual event for some 40 years, qualifies as a past practice. This past practice is part of the collective bargaining agreement whether expressed therein as in the case at bar, or not. The Court is squarely presented with a Fourth Circuit holding substituting its different and non-statutory evidence standard bearing upon the conclusiveness of the Board's factual findings, in place of the established and required statutory standard. The statute requires review of the record for substantial evidence to support the Board's findings **"on the record considered as a whole".** In its brief to the Fourth Circuit, Board counsel does not address the record testimony before the ALJ of Media General's chief negotiator, James V. Meath, who confirmed the extensive negotiations between Media General and the RNPA on the Christmas bonus issue. Nor does the Fourth Circuit address directly Meath's testimony, the decision stating: **"The record contains testimony indicating that the bonuses may have been**

**discussed during the general negotiations over the new collective bargaining agreement".** (App. A-13)

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

# In The Supreme Court of the United States

**RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,**

***Petitioner,***

**v.**

**MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a Richmond Times Dispatch**
**and**
**NATIONAL LABOR RELATIONS BOARD,**

***Respondents.***

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1023

Filed: May 16, 2007

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,

RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,

Intervenor.

No. 06-1061

RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Intervenor.

No. 06-1213

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Respondent.

On Petition for Rehearing and Rehearing En Banc

The petitions for rehearing and rehearing en banc of Richmond Newspapers Professional Association and Media General Operations, Incorporated were submitted to this Court. As no member of this Court or the panel requested a poll on the petitions for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and rehearing en banc are denied.

Entered for a panel composed of Judge Niemeyer, Judge Michael, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1023

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,

RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,

Intervenor.

No. 06-1061

RICHMOND NEWSPAPERS PROFESSIONAL ASSOCIATION,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent,

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Intervenor.

No. 06-1213

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MEDIA GENERAL OPERATIONS, INCORPORATED, d/b/a
Richmond Times-Dispatch,

Respondent.

On Petitions for Review and Cross-application for Enforcement of an Order of the National Labor Relations Board. (5-CA-29157; 5-CA-29902; 5-CA-29914)

Argued: November 30, 2006
Decided: March 15, 2007

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

Petitions for review denied; cross-application for enforcement granted by unpublished per curiam opinion. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

ARGUED: James V. Meath, WILLIAMS MULLEN, Richmond, Virginia, for Media General Operations, Incorporated, d/b/a Richmond Times-Dispatch. Jay Joseph Levit, Glen Allen, Virginia, for Richmond Newspapers Professional Association. Kellie J. Isbell, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for the Board. ON BRIEF:King F. Tower, Heath H. Galloway,

WILLIAMS MULLEN, Richmond,Virginia, for Media General Operations, Incorporated, d/b/a Richmond Times-Dispatch. Ronald Meisburg, General Counsel, John E. Higgins, Jr., Deputy General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Fred B. Jacob, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for the Board.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This consolidated case is before us on the petitions of Media General Operations, Inc., d/b/a Richmond Times-Dispatch (Media General), and Richmond Newspapers Professional Association(RNPA) to review an order of the National Labor Relations Board(NLRB or Board). The NLRB has filed a cross-application for enforcement of its order. The NLRB determined that Media General violated sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), (5), by disparately enforcing a company e-mail policy and by failing to negotiate before discontinuing payment for time spent by union negotiators in bargaining sessions. The NLRB also dismissed RNPA's complaints that Media General violated sections 8(a)(1) and (5) by failing to negotiate over the discontinuance of holiday bonuses and by failing to pay the union president for time spent in arbitration. For the reasons set forth below, we deny the petitions for review and enforce the Board's order.

I.

Media General publishes the Richmond Times-Dispatch, a Daily newspaper. RNPA represents the newspaper's reporters and other newsroom employees. Successive collective bargaining agreements and accumulated past

practice have governed the relationship between Media General and RNPA for the past forty years. In 2000 and 2001 RNPA complained to the NLRB that Media General had changed certain past practices without bargaining and had enforced its e-mail policy in a discriminatory manner against union members.
A.

The first complaint stems from Media General's instruction to the union to stop using the company e-mail system to disseminate union messages. Media General had an official e-mail policy that restricted use of the company e-mail system to matters related to company business. The policy stated that "[t]he e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business." J.A. 586. In practice, however, employees transmitted a wide variety of messages unrelated to company business, including personal messages, charitable announcements, and union matters. Media General did little to prevent these uses and disciplined only two employees for violations that involved pornography. The general tolerance for email violations began to change in May or June 1999 when Media General informed the RNPA president, Jonathan Pope, in a telephone conversation that the union could not use the company's e-mail system for communicating union messages. This was followed by a second verbal warning to Pope in September 1999. Pope did not convey these warnings to the other union leaders or the general membership. Apart from a reminder sent to Pope by e-mail in June 2000, the company took no further action. The rest of the RNPA bargaining committee first learned of Media General's intent to enforce the e-mail policy during negotiations for a new collective bargaining agreement in July 2000. Media General told union leaders to stop using Media General e-mail for union business. Shortly thereafter, the union complained to the NLRB that Media General had

enforced the e-mail policy in a discriminatory manner against the union.

B.

During the same July 2000 negotiations, Media General announced that it would no longer pay employee representatives of the union for time spent in bargaining sessions. Media General had routinely offered such pay since 1995. Despite its past conduct, the company did not allow discussion of its changed stance during the ongoing negotiation sessions. The company stopped paying for bargaining time in September 2000. To avoid a reduction in pay, several union leaders worked additional hours to make up time spent in bargaining sessions.

C.

RNPA also complained that Media General had engaged in an unfair labor practice when it refused to pay a union representative for time spent in arbitration proceedings. The complaint arose out of a 1999 arbitration of an RNPA grievance concerning an employee's discharge. This was the first arbitration between the parties since 1969. Media General paid RNPA president Pope for time spent discussing the grievance with Media General management, but did not pay him for time spent in formal arbitration proceedings. Media General informed Pope that arbitrations differed from negotiations, and so the general practice of paying for negotiation time did not encompass arbitration time. Pope was required to use a vacation day in order to receive pay for the hours spent in arbitration.

D.

The union's last complaint concerned the elimination of holiday bonuses. Media General had paid employees an annual holiday bonus since 1960. In July 2001 Media General called the RNPA president to discuss the company's plan to discontinue the holiday bonus. The company attributed its decision to a general economic downturn and acknowledged that it was a bargainable issue. Following the phone call to the union, Media General sent a letter to all

employees informing them that "[a]s a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year . . . ." J.A. 630. After receiving this letter and the company's offer to bargain, the union requested "books and records from which [it] c[ould] determine whether there [was] a 'cash flow' problem . . . ." J.A. 631-32. The union president declined to bargain until requested financial information was made available to RNPA. Media General explained to RNPA that it had not terminated the bonuses because of an inability to pay; rather, it had voluntarily opted for "belt-tightening." J.A. 633. The company maintained that it was not obliged to turn over the requested information and now argues that the union waived its right to pretermination bargaining by refusing to negotiate.

II.

Media General urges us to set aside the NLRB order requiring the company to cease its disparate enforcement of its email policy and to negotiate with RNPA over the termination in pay for collective bargaining time. We will uphold the NLRB's findings of fact when supported by substantial evidence. TNT Logistics of North Am., Inc. v. NLRB, 413 F.3d 402, 405 (4th Cir. 2005). We also will defer to the Board's reasonable legal conclusions. Americare Pine Lodge Nursing & Rehabilitation Center v. NLRB, 164 F.3d 867, 874 (4th Cir. 1999).

A.

An employer engages in an unfair labor practice when it attempts to influence its employees' efforts to organize by interference, restraint, or coercion. 29 U.S.C. § 158(a)(1). As part of this prohibition, an employer may not interfere with its employees' ability to communicate union messages or discriminate between union communications and other non-company messages in the workplace. See NLRB v. Challenge-Cook Bros. of Ohio, Inc., 374 F.2d 147, 153 (6th Cir. 1967). When company-sponsored channels of communication are opened to non-company purposes, the

NLRA prohibits an employer from preventing use for union purposes. See NLRB v. Honeywell, Inc., 722 F.2d 405, 406-07 (8th Cir. 1983); E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 893, 893 n. 4, 919 (1993).

Media General first argues that the union's claim was not timely because, if any discriminatory enforcement occurred, it happened at the time of the first warning in 1999. The NLRB reasonably found that the company's July 2000 enforcement of the policy was independent of prior warnings that occurred outside the limitations period. NLRA section 10(b) requires employees wishing to challenge an unfair labor practice to file a charge within six months of the alleged violation. 29 U.S.C. § 160(b). The first warning was issued over a year before the union filed its complaint. The NLRB, however, found that the claim was not timebarred because each of Media General's warnings to the union constituted independent violations of section 8(a)(1). Cf. Brewery, Soda & Mineral Water Bottlers of Calif., 339 N.L.R.B. 769, 770 (2003) (reposting of identical letters within the 10(b) period renders them vulnerable to attack). Under this interpretation, the July 2000 warning falls solidly within the 10(b) period. This warning can reasonably be deemed a separate violation because Media General had taken no action to punish violators after the prior warnings to the union president. Moreover, the July 2000 warning was issued to a broader group of union leaders in the formal context of a collective bargaining session. This distinguishes the July 2000 warning from the company's prior informal communications to Pope.

The NLRB's conclusion on the merits was also reasonable. The Media General e-mail policy restricted use of the e-mail system to company purposes. The company made no attempt, however, to enforce the policy against any violations other than union messages. The record contains numerous examples of messages unrelated to the work of the newspaper. The e-mail system was frequently used by both hourly employees and managers to convey news about the

employees' personal lives, to arrange social events, and to inform employees about charities. Restriction of the union's access to this communication channel, while others were allowed unfettered access, is an unfair labor practice that is prohibited by the NLRA.

B.

NLRA sections 8(a)(5) and (d), 28 U.S.C. § 158(a)(5), (d), require employers to engage in good faith collective bargaining with union representatives before changing a term or condition of employment. NLRB v. Katz, 369 U.S. 736, 743 (1962). Terms or conditions of employment are subject to mandatory bargaining if they have been memorialized in a collective bargaining agreement or if they have been established by the employer's past practice or custom. Bonnell/Tredegar Indus., Inc. v. NLRB, 46 F.3d 339, 344 (4th Cir. 1995). Pay for time spent in negotiation sessions may qualify as a subject of mandatory bargaining. See Axelson, Inc. v. NLRB, 599 F.2d 91, 94-95 (5th Cir. 1979).

The collective bargaining agreement between RNPA and Media General does not require the company to pay union representatives for time spent in negotiations. Thus, Media General's unilateral decision to discontinue pay for bargaining time would be prohibited only if the company had established a past practice of awarding such pay. See Bonnell/Tredegar, 46 F.3d at 344. For at least five years, Media General routinely paid union negotiators for time spent in collective bargaining. This is sufficient to establish a past practice. See, e.g., Keystone Steel & Wire v. NLRB, 41 F.3d 746, 750 (D.C. Cir. 1994) (six-year practice established an implied term or condition of employment). The lack of any evidence of an offer to bargain prior to the termination announcement supports the NLRB's conclusion that Media General failed to fulfill its duty to bargain in good faith with RNPA.

III.

In its petition RNPA argues that the NLRB erroneously dismissed its claims related to holiday bonuses and pay for arbitration time. We will uphold the NLRB's dismissal of a claim so long as there is a rational basis in the record for the Board's action. Am. Postal Workers Union v. NLRB, 370 F.3d 25, 27 (D.C. Cir. 2004).

A.

RNPA claims that Media General impermissibly altered a term of employment by refusing to pay union representatives for time spent in arbitration of grievances. The union argues that the company's past practice of paying for time spent in preliminary grievance proceedings and collective bargaining prevent Media General from refusing to pay for arbitration time without first bargaining to impasse.

Grievances between RNPA and Media General are typically resolved before reaching arbitration. The only other arbitration in recent memory was held in 1969. The collective bargaining agreement between the parties distinguishes between ordinary grievance resolution and arbitration. When a grievance is brought, the parties have five days in which to hold a meeting and attempt to reach agreement regarding the dispute. The dispute goes to arbitration only if the parties fail to reach agreement within thirty days and one of the parties requests it. Unlike the preliminary grievance proceedings, an arbitration involves outside decisionmakers and takes on a more adversarial tone. The NLRB could reasonably conclude that Media General may have wanted to pay for cooperative efforts to resolve grievances to avoid arbitration, but not wanted to pay once negotiations had broken down and outside dispute resolution was required. Thus, the NLRB had a rational basis for concluding that the infrequency of arbitrations and the differing roles assumed by the parties support an inference that the company wished to establish a custom of pay for preliminary grievance resolution but not for arbitration. The NLRB reasonably required the union to show a past practice

relating specifically to arbitration proceedings. Because only one other arbitration had occurred in the preceding thirty years, the union failed to show that pay for arbitration time had become an implied term of employment and a mandatory subject of bargaining.

B.

Media General concedes that the annual holiday bonus was a term of employment that it could not change unilaterally without bargaining. It argues, however, that it was relieved of the duty when RNPA rebuffed its offer to bargain for no valid reason. RNPA claims that it was entitled to examine certain company financial data before bargaining and that Media General violated the NLRA by withholding the requested information.

An employer's refusal to accommodate a union's request for financial information to substantiate a claimed inability to meet union demands "may support a finding of a failure to bargain in good faith." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956). The company need not honor such requests when it expresses only an unwillingness to pay. Wash. Materials, Inc. v. NLRB, 803 F.2d 1333, 1338-39 (4th Cir. 1986).

To show Media General's inability to pay, the union relies on a letter sent by Media General to all employees informing them of its decision to discontinue payment of holiday bonuses. The letter stated that the company was "unable to pay" the 2001 holiday bonus because of the "poor economic climate." J.A. 630. The letter described the elimination of bonuses as part of a broader plan to cut costs and avoid layoffs. Despite the "unable to pay" language, reasons such as these are generally interpreted as expressions of unwillingness to pay. Nielsen Lithographing Co., 305 N.L.R.B. 697, 700 (1991). Elimination of a benefit in response to poor economic conditions is not the same as a claim that the company is without resources to pay the benefit. The company's response to the union's request for financial information clarified explicitly that it was

unwilling, rather than unable, to pay the bonuses. Substantial evidence thus supported the NLRB's conclusion that Media General had no duty to disclose its financial information to the union.

Without any unfulfilled duty on the part of Media General, RNPA had no basis for its refusal to bargain. A union must act with due diligence to request bargaining when it receives notice of a contemplated change in the terms or conditions of employment. Haddon Craftsmen, Inc., 300 N.L.R.B. 789, 790-91 (1990). If the union fails to make such a request, there are no
grounds for finding that the employer violated its duty to bargain in good faith. Id.

After declining Media General's initial offer to bargain, RNPA never asked for independent bargaining sessions to address the bonus issue. The record contains testimony indicating that the bonuses may have been discussed during the general negotiations over the new collective bargaining agreement. However, the contradictions in the record and the union's clear failure to request bargaining on the bonus issue provide a rational basis for the NLRB's conclusion that Media General did not violate its duty to bargain.

IV.

In sum, substantial evidence supports the NLRB's conclusions that Media General violated NLRA sections 8(a)(1) and(5) by enforcing its e-mail policy in a discriminatory manner and discontinuing pay for time spent in negotiations. The NLRB also had a rational basis for dismissing RNPA's arbitration and holiday bonus claims. We therefore deny the petitions for review and grant the Board's application for enforcement of its order.

PETITIONS FOR REVIEW DENIED; CROSS-APPLICATIONFORENFORCEMENT GRANTED

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I would grant the petition for review and deny the NLRB's enforcement with respect to the e-mail policy. Otherwise, I agree with the majority opinion.

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Media General Operations, Inc., d/b/a Richmond Times-Dispatch *and* Richmond Newspapers Professional Association.** Cases 5–CA–29157, 5–CA–29902, and 5–CA–29914

DECEMBER 16, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 4, 2002, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel, the Union, and the Respondent each filed exceptions and supporting briefs. The Respondent and the Union filed answering briefs, and the Respondent and the General Counsel filed reply briefs. Also, the General Counsel filed supplemental exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision.[1]

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[1] In light of our reversal of the judge's finding that the allegation regarding the e-mail policy is time barred, we deny the General Counsel's special appeal to revoke the protective order entered by the administrative law judge governing the production and exchange of specific subpoenaed documents relevant to this issue. We note there has been no showing of prejudice from the entry of the protective order. Also, the Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We agree with the judge's conclusion that the Respondent violated Section 8(a)(5) by failing to negotiate over a change regarding paying union negotiators for time spent in bargaining sessions. Likewise, we agree with the judge's conclusion that the Respondent did not unilaterally change its past practice in refusing to pay a unit employee for time spent conducting official collective-bargaining functions during an arbitration.[2] We also agree with the judge's

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Member Liebman dissented from an earlier Order in which the Board declined to rule on the General Counsel's special appeal seeking to revoke the protective order. See *Richmond Times-Dispatch*, Case 5–CA–29157, et al., (2002) (not published in Board volume). In her view, the protective order should have been revoked, because the Respondent failed to demonstrate that the requested documents were confidential or to establish other good cause for the imposition of the order. For the same reason, Member Liebman would now grant the General Counsel's special appeal and revoke the protective order.

[2] As found by the judge, the arbitration at issue was the first between the parties since at least 1969, thus there was no established practice of paying the Union's representatives at arbitration proceedings. By its very terms, a finding of a binding past practice at least requires evidence that the practice has a regular, longstanding history, so that employees may reasonably expect it to continue. In this case, no such evidence exists. Thus, we agree with the judge that the Respondent did not violate Sec. 8(a)(5) and (1) by refusing to pay for time spent in the arbitration proceeding. In doing so, we reject our dissenting colleague's suggestion to treat as indistinguishable all collective-bargaining functions, noting, as the judge noted, that the parties themselves distinguished between arbitrations and other collective-bargaining functions in their collective-bargaining agreement.

Contrary to the majority and the judge, Member Liebman would find that the Respondent violated Sec. 8(a)(5) and (1) by refusing to pay unit employee Jonathan Pope for time spent as the Union's representative at the arbitration of a fellow unit employee's discharge grievance. The grievance was arbitrated pursuant to the grievance and arbitration provision of the parties' collective-bargaining agreement. In Member Liebman's view, the absence of prior arbitrations is not determinative. The Respondent had a general past practice of paying employee union representatives for time spent performing collective-bargaining functions during working time. For example, the Respondent paid employees for attending contract negotiations, grievance meetings and hearings (including the grievance hearing for the employee whose arbitration is at

conclusion that the Respondent did not violate the Act by unilaterally terminating the holiday bonus or by refusing to provide financial data requested by the Union, as discussed in *Richmond Times-Dispatch*, 345 NLRB No. 11 (2005).[3] In contrast, we find merit in the argument that the judge erred in applying Section 10(b)[4] to bar the claim that the Respondent violated Section 8(a)(1) by its disparate enforcement of its computer/e-mail policy. Contrary to the judge, we find that Section 10(b) does not bar the claim

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issue here), and "information-gathering meetings" and other discussions with management concerning layoff and consolidation issues that arose when another newspaper was merged into the Respondent. Indeed, prior to the alleged changes at issue here, there is no evidence of any collective-bargaining function performed during working time for which employees were not paid. Member Liebman would thus find that the Respondent's practice of paying employees for time spent performing collective-bargaining functions had become an implied term and condition of employment, and Pope's role as the Union's representative at the arbitration was such a function.

The majority's reliance on the collective-bargaining agreement's "[distinction] between arbitrations and other collective-bargaining functions" is pure hairsplitting. The provisions of the agreement, items 1 and 2 of sec. X of the agreement, simply describe the steps of the grievance and arbitration process. They do not provide a basis for excluding arbitration from the rubric of "collective bargaining functions" or from the practice of paying employees for time spent on those functions. Accordingly, Member Liebman would find that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally refusing to pay Pope for time spent at the arbitration.

[3] As the facts and arguments relating to the claims raised regarding the cancellation of the holiday bonus are substantially similar to the facts in *Richmond Times-Dispatch*, 345 NLRB No. 11 (2005), we will not discuss those issues here, as that case is controlling on those issues.

For the reasons stated in her dissent in that case, Member Liebman would find that the Respondent violated Sec. 8(a)(5) and (1) in the present case by unilaterally canceling the holiday bonus and by refusing to furnish the requested financial information.

[4] Sec. 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

raised, although we agree with the judge's alternate finding that the Respondent disparately enforced its policy, as discussed below.

## I. FACTS[5]

On July 13, 2000,[6] at the first bargaining session for a successor bargaining agreement, Frank McDonald, the Respondent's then-vice president of human resources, informed the Union's entire bargaining committee—which included then-Union President Jonathan Pope—that they should stop using the Respondent's computers and e-mail for union business. McDonald memorialized these instructions in a July 20 letter to Pope. Although this was not the first time McDonald had informed Pope that the Respondent's computers and e-mail were not to be used for union business,[7] this was the first instance when the other members of the Union's bargaining committee had been informed of the Respondent's policy. The Union filed unfair labor practices charges, alleging disparate enforcement of the computer/e-mail policy violating Section 8(a)(1), on August 7, 2000, with a copy served on the Respondent on August 10.

Evidence developed at the hearing shows that the Respondent's computer equipment and e-mail have commonly been used for a broad range of nonbusiness uses—both personal use and use on behalf of third-party organizations. The Respondent and the Union have used e-mail to jointly sponsor charitable campaigns, and management officials have used e-mail to advertise events sponsored by organizations such as the Society of Professional Journalists, the Virginia Press Women's

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[5] These facts relate only to the judge's finding discussed above that Sec. 10(b) bars the claims regarding the Respondent's computer/e-mail policy.

[6] All dates are in 2000, unless otherwise noted.

[7] From November 10, 1998 through June 8, 2000, Pope was advised several times that the Union should stop using the Respondent's computers and e-mail for union business.

Organization, and the Organization for Minority Journalists. Likewise, both management officials and employees have used e-mail for a wide variety of personal messages. Also, during fall 1998, McDonald and Pope collaborated on an e-mail Pope sent to unit employees about proposed changes in their health insurance policy. McDonald reviewed Pope's draft, suggested changes, and complimented Pope on the quality of the message. Similarly, in August 2001, the Respondent communicated with the Union over e-mail to finalize proposals for part-time employees.

## II. THE JUDGE'S DECISION

The administrative law judge found the charge regarding the disparate enforcement was time barred. After indicating that the 6-month period provided by Section 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice, *Allied Production Workers Local 12 (Northern Engraving Corp.)*, 337 NLRB 16, 18 (2001), the judge found the Union had clear notice of the policy in 1999, when Pope was informed that the computers and e-mail were not to be used for union business. The judge rejected the argument that each of the Respondent's notifications constituted an independent unfair labor practice, relying on *Continental Oil Co.*, 194 NLRB 126 (1971), where the Board held that each application of a unilaterally-implemented change made more than 6 months earlier did not constitute an independent failure to bargain.

However, the judge alternatively provided that, should the Board disagree that the charges are time barred, the Respondent violated Section 8(a)(1) by disparately barring the Union from using its equipment and e-mail for union business. Noting that an employer has a right to restrict the use of its bulletin boards but that the right may not be exercised discriminatorily so as to restrict postings of union materials,[8] the judge held that, analogously, the Respondent

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[8] The judge relied on *J. C. Penney Inc.*, 322 NLRB 238 (1996). Although not noted by the judge, the Seventh Circuit enforced the

unlawfully discriminated against the Union when it denied access to its computer equipment and e-mail system to distribute union literature and notices because it permitted employees' routine use of its computer equipment and e-mail system for a wide variety of purposes.

## III. THE EXCEPTIONS

The General Counsel and the Union argue the judge erred in applying Section 10(b), stressing that even assuming the Union had clear and unequivocal notice that the Respondent was disparately enforcing its policy before the 10(b) period (which they argue was not the case), the Respondent's subsequent conduct constitutes new and independent 8(a)(1) violations. See *Assoc. Builders and Contractors*, 331 NLRB 132, 134 (2000) (adopting administrative law judge's finding that Section 10(b) did not bar allegations that a trade association unlawfully filed and maintained a lawsuit even though the lawsuit was filed outside the 6-month period). Under this theory, the operative facts establishing disparate enforcement occurred on July 13 and July 20, 2000—within the 10(b) period.

On the other hand, the Respondent argues the judge erred in finding the Respondent's conduct would have violated Section 8(a)(1) if not for Section 10(b). The Respondent asserts its policy prohibiting e-mail use on behalf of organizations for objectives distinct from its own objectives is not discriminatory. Alternatively, the Respondent suggests it may be time to re-evaluate a jurisprudence which developed in the context of telephones and bulletin boards, because new technology differs greatly.

## IV. ANALYSIS

We find merit in the exception that the judge erred in applying Section 10(b) to bar the 8(a)(1) claim. Rather than finding the claims to be time barred under Section 10(b), we view each incident of disparate enforcement of the

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Board's decision in relevant part. *J. C. Penney Co. v. NLRB.*, 123 F.3d 988 (7th Cir. 1997).

Respondent's computer/e-mail policy as a separate and independent act for purposes of Section 10(b). In light of our holding, we adopt the judge's alternative conclusion that the Respondent violated Section 8(a)(1) by its disparate enforcement of its rules within the 10(b) period.

This case is analogous to *Seton Co.*, 332 NLRB 979 (2000), where the Board found the employer violated Section 8(a)(1) by discriminatorily enforcing a no-solicitation/no-distribution rule against employees' prounion activities while knowingly allowing employees to solicit and distribute antiunion materials. 332 NLRB at 979. Although the Board detailed evidence of disparate enforcement that occurred outside the 10(b) period, the Board emphasized that it was only relying on a warning within the period to establish the violation. Id. at 979 fn. 6 and 983–984. In that case, the employer gave similar warnings that were not actionable because of the time bar, but its prior actions did not affect the viability of a claim based on similar conduct; each instance was viewed as a separate and independent event for purposes of Section 10(b).[9] See *Norman King Electric*, 334 NLRB 154, 162 (2001) (adopting judge's conclusion that discriminatory applications of a policy are actionable even if the policy was announced outside the 6-month period); see also *Iron Workers Local 433 (Steel Fabricators)*, 341 NLRB 523, 523 fn. 1 (2004) (finding that the reiteration of statement within the 10(b) period violated Section 8(b)(1)(A) even though any claim made on the original statement would be time barred under Section 10(b)); *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769 (2003) (finding an

[9] Our concurring colleague is correct that the Board, in *Seton*, found that a complaint allegation was "closely related" to a timely amended charge. *Seton Co.*, supra at 983. However, the Board also found it could not base a disparate enforcement violation on incidents which occurred more than 6 months from the filing of the amended charges, but it could and did find violations based on disparate enforcement occurring within 6 months of the filing of the charges. Id. at 983–984. Consequently, *Seton Co.* is relevant to the proper application of Sec. 10(b) where disparate enforcement of a policy is alleged.

8(b)(1)(A) violation based on union's repeated posting of letters threatening internal discipline within the 10(b) period and indicating that the posting of identical threats outside the 10(b) period had no effect on the claim).

*Continental Oil Co.*, relied on by the judge, is inapposite, as the employer was alleged to violate Section 8(a)(5) by failing to bargain over a change, which the Board concluded had occurred prior to the 10(b) period. *Continental Oil Co.*, supra at 126; see also *Arrow Line, Inc./Coach USA*, 340 NLRB 1 (2003) (relying upon *Continental Oil Co.* to apply Section 10(b) to bar an 8(a)(5) claim based on the employer's midterm modification of vacation pay calculations which continued unchanged during the 10(b) period). In sum, for purposes of Section 8(a)(5), the Board has held that maintaining unchanged the same term and condition of employment during the 10(b) period does not give rise to a new duty to bargain. In the case at hand, however, the claims are 8(a)(1) allegations of disparate enforcement of the computer/e-mail policy. Although the enforcement efforts made by the Respondent in July were arguably substantially similar to enforcement efforts made as early as November 1998, the fact that the Respondent disparately enforced its rules outside the 6-month period provided by Section 10(b) does not forever immunize the Respondent from allegations that it unlawfully enforced its rule through new actions taken within the statutory period.[10]

Because we reverse the administrative law judge's conclusion that Section 10(b) bars the complaint allegation that the Respondent instructed the Union on July 13 and July 20 that its computer equipment and e-mail system was not to be used for conducting union business, we adopt the judge's alternative conclusion that the Respondent's disparate enforcement of its rules violated Section 8(a)(1). We base this conclusion on the specific circumstances of this case,

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[10] Although the complaint did not raise the allegation, Sec. 10(b) would bar any claims against the Respondent's enforcement efforts that occurred more than 6 months before the instant charge.

especially in light of the breadth of the e-mail usage permitted by the Respondent, which included a wide variety of e-mail messages unrelated to the Respondent's business.[11]

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs accordingly.

"3. The Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by selectively and disparately informing the Union that it was prohibited from utilizing the Respondent's e-mail and computer systems to send union bulletins and other union-related business."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Richmond Times-Dispatch, Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraph accordingly.

"(a) Selectively and disparately prohibiting unit employees from utilizing the Respondent's e-mail and computer systems to send union bulletins and other union-related notices."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2005

Wilma B. Liebman, Member

[11] We need not rely on evidence that the Respondent allowed the use of e-mail to jointly sponsor the United Way and March of Dimes campaigns with the Union, to announce professional journalism society events, or to communicate proposed changes in health insurance or part-time employment.

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring in part.

I concur in the conclusion that there was no 10(b) bar to the complaint's allegation that the Respondent selectively and disparately enforced its policy concerning the use of the Respondent's computers. However, in my view, where a party, outside the 10(b) period, gives clear and unequivocal notice of a discriminatory practice, and acts consistent with that practice, Section 10(b) would bar an attack on the practice as it continues into the 10(b) period. In the instant case, the Respondent gave such clear and unequivocal notice of its discriminatory conduct in May or June 1999, well outside the 10(b) period. However, the Union, through Pope, thereafter used the computers for union business, and the Respondent did not seek to enforce that discriminatory practice. Thus, the Union would reasonably believe that a discriminatory practice was no longer being followed, and would reasonably forego the filing of a charge. However, in July 2000, within the 10(b) period, Respondent renewed its disparate treatment of union activity, and there is no suggestion that it thereafter desisted in this practice. The Union filed its charge in August 2000. In these circumstances, I would find no 10(b) bar to an attack on the July 2000 action.[1]

[1] I conclude that *Seton Co.*, 332 NLRB 979 (2000), is inapposite. The 10(b) argument there was focused on whether the General Counsel's dismissal letter encompassed the allegation at issue, and on whether that allegation was "closely related" to an earlier and timely charge. See *Redd I*, 290 NLRB 1115 (1988). And, although the Board found violations based on discriminatory conduct within 6 months of the filing of a live charge, there was no finding, as here, that the discriminatory

On the merits, I note particularly that the Respondent permitted use of its e-mail for a wide variety of personal messages. If the Respondent had restricted use of its e-mail to matters related to its own business and to related matters (e.g., the professional organizations in the newspaper industry, as set forth in the facts), I might well reach a contrary result.

Dated, Washington, D.C. December 16, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT selectively and disparately prohibit unit employees from utilizing the Respondent's e-mail and

conduct began outside the 10(b) period. Thus, there was no discussion of the theory applied here by my colleagues.

computer systems to send union bulletins and other union-related notices.

WE WILL NOT refuse to bargain in good faith with the RNPA by implementing unilateral changes in employees' wages, work schedules, and other terms and conditions of employment without bargaining to agreement or lawful impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the changes in the wages and work schedules of employee members of the RNPA negotiating committee, and restore all terms and conditions of employment as they existed prior to the change.

WE WILL make employee members of the RNPA negotiating committee whole for any loss of earnings and other benefits resulting from their time spent in bargaining sessions with employer representatives, with interest.

MEDIA GENERAL OPERATIONS, INC., D/B/A RICHMOND TIMES-DISPATCH

*Thomas P. McCarthy, Esq.*, for the General Counsel.
*James V. Meath, Esq.*, and *King F. Tower, Esq.*, of Richmond, Virginia, for the Respondent-Employer.
*Jay J. Levit, Esq.*, of Richmond, Virginia, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

Bruce D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on March 18, 19, and 20, 2002, in Richmond, Virginia, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 5 of the National Labor Relations Board

(the Board) on October 31, 2001.[1] The complaint, based upon charges in Cases 5–CA–29157, 5–CA–29902, and 5–CA–29914 filed by the Richmond Newspapers Professional Association (the Union or RNPA), alleges that Media General Operations, Inc., d/b/a/ Richmond Times-Dispatch (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

## ISSUES

The complaint alleges that the Respondent enforced its Computer Equipment and Electronic Mail Policies selectively and disparately by informing the RNPA that it was prohibited from utilizing the Employer's e-mail and computer systems to send RNPA bulletins and other RNPA related business in violation of Section 8(a)(1) of the Act. Additionally, the complaint alleges that the Respondent unilaterally changed wages and working conditions of bargaining unit members for time spent representing the Union in an arbitration hearing and for time spent as employee members of the Union negotiating committee. Lastly, the complaint alleges violations of Section 8(a)(1) and (5) of the Act by Respondent's conduct in unilaterally discontinuing the practice of paying the Christmas or holiday bonus to its employees and by refusing to provide financial information to the Union requested by it to substantiate the Respondent's inability to pay the bonus.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, RNPA, and the Respondent, I make the following

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[1] All dates are in 2001 unless otherwise indicated.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent is a corporation engaged in the publication of the Richmond Times-Dispatch, a daily newspaper, with an office and place of business located in Richmond, Virginia, where it annually derives gross revenues in excess of $200,000 and has purchased and received products, goods and materials, valued in excess of $5000 directly from points located outside the State of Virginia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

The RNPA represents all news employees at the Respondent and has been the designated exclusive collective-bargaining representative of the unit since on or about January 1, 1966. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from August 19, through August 18, 2004 (GC Exh. 33). The parties commenced negotiations for the above agreement on July 13, 2000, and engaged in 42 negotiation sessions including those held on August 3, 8, and 9.[2]

At all material times J. Stewart Bryan III, held the position of chairman and chief executive officer of Respondent, George L. Mahoney is general counsel and secretary, Frank A. McDonald Jr. serves as vice president of human resources, and Louise Seals is the managing editor. Officials of the RNPA include President Michael Paul Williams, Vice

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[2] After these meetings, counsel for the respective parties conducted additional negotiations by telephone in order to bring the agreement to closure.

President Michael Martz, and former Presidents Randolph Smith and Jonathan Pope.

### *B. The 8(a)(1) Violations*

#### 1. THE UNDERLYING ALLEGATIONS

The General Counsel alleges in paragraphs 5 and 6 of the complaint that the Respondent maintains specific rules for the use of its computer equipment and e-mail system (GC Exh. 30).[3] On or about July 13 and July 20, 2000, the Respondent enforced the rules selectively and disparately by informing the RNPA that it was prohibited from utilizing the Employer's computer and e-mail systems to send RNPA bulletins and other RNPA related business to bargaining unit members.

#### 2. TIMELINESS OF THE CHARGE

Respondent notes that the Union filed the unfair labor practice charge alleging these allegations on August 7, 2000. It argues that the Union, by notification to former President Pope, was instructed not to use the Employer's computer equipment and e-mail system for union business on a number of occasions in 1998 and 1999. Therefore, the charge filed on August 7, 2000, alleging that the RNPA should cease using the Employer's computer equipment and e-mail systems for union business is untimely and must be dismissed.

McDonald testified that on November 10, 1998, he sent Pope a letter to confirm his prior oral request that the RNPA stop using the Employer's computer equipment and e-mail system to deliver union messages and conduct union

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[3] The policy relating to the use of computer equipment states that, "The computers throughout Media General (the Company) are business equipment and they have been acquired to support Company operations. The use of this equipment for personal, or any other purpose other than the Company's business, must be approved by the Department Head." The policy also states, "The e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business."

business (CP Exh. 1). Pope credibly testified that he did not receive the letter but did admit that in a telephone conversation with McDonald in May or June 1999, the content of the November 1998 letter was thoroughly discussed. During that conversation, McDonald once again orally instructed Pope that his continued use of the computer equipment and e-mail system for union-related business was a breach of Employer policy. Thereafter, in a conversation with McDonald in September 1999, Pope acknowledged that he was once again informed that use of the Employer's e-mail system and computer equipment for conducting union business was against Employer policy. Pope testified that after each conversation with McDonald concerning this matter, he continued to utilize the computer equipment and e-mail system to communicate with bargaining unit members about union business. He expressed his opinion that McDonald's instructions were illegal and contrary to law. Pope further acknowledges that on June 8, 2000, he received an e-mail from Director of Human Resources Karen Larsen that he should cease using the Employer's computer equipment and e-mail system for union business (GC Exh. 28). Finally, on July 13, 2000, at the commencement of the parties' first collective-bargaining session on the successor agreement, Pope admits that McDonald once again orally informed him to stop using the Employer's computer equipment and e-mail system for union business. McDonald followed up this conversation with Pope by a letter dated July 20, 2000. In pertinent part, the letter apprised Pope that he has informed him on several occasions over the past couple of years that the Employer's e-mail and computer systems are not available for personal use and/or use for outside organizations (GC Exh. 14).

Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon" the charged party. Although the General Counsel may rely on

evidence outside the 10(b) period as "background," he is barred from bringing any complaint in which the operative events establishing the violation occurred more than 6 months before the unfair labor practice charge has been filed and served. *Allied Production Workers Local 12 (Northern Engraving Corp.)*, 337 NLRB 16 (2001). The statute of limitations under Section 10(b) begins to run, however, only when a party has "clear and unequivocal notice" of a violation of the Act. Id. Notice can be actual or constructive. Thus, the Board has found sufficient notice to start the limitations period where a party, "in the exercise of reasonable diligence, should have become aware" of facts indicating that the Act had been violated. *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992). The burden of showing that a charging party was on notice of a violation of the Act is on the Respondent. *A & L Underground*, 302 NLRB 467, 468 (1991).

The charge here was filed on August 7, 2000, and a copy was served on the Respondent on August 10, 2000. To satisfy its burden under Section 10(b), the Respondent has to show that the Union knew or could have known by the exercise of reasonable diligence, before February 11, 2000, that it was aware of the Employer's policy to stop using the computer equipment and the e-mail system for union-related business. In the particular circumstances of this case, I find that the RNPA had clear and unequivocal notice of the Employer's policy that use of the computer equipment and e-mail system was not permitted for union-related business. There can be no question that Pope, as the then-union president, was officially informed in 1999 by McDonald to stop using the computer equipment and e-mail system for union business.

The General Counsel argues that even if the Union was apprised of the Employer's prohibited use of computer equipment and the e-mail system more than 6 months prior to the filing of the August 7, 2000 charge, each individual notification within the 10(b) period is an independent

violation of the Act. Thus, when the Respondent notified the Union on June 8, 2000, and again on July 20, 2000, individual timely violations occurred. I have also considered whether the Respondent's instructions to Pope concerning use of the computer equipment and e-mail system is a "continuing violation." A continuing violation is one where the respondent commits an unfair labor practice outside the 10(b) period that continues during the period. Although Section 10(b) would bar complaint and remedial relief for the conduct occurring more than 6 months before a charge is filed, relief may be sought for conduct within the 10(b) period which would constitute a separate and distinct substantive violation in its own right.

The alleged unfair labor practice here is the Respondent's instructions to the RNPA to stop using the Employer's computer equipment and e-mail system for union business. The case is thus similar to the facts in *Continental Oil Co.*, 194 NLRB 126 (1971). There, the employer unilaterally implemented a method of equalizing overtime that clearly departed from the express terms of the collective-bargaining agreement more than 6 months before the charge was filed. The employer continued to follow this system during the 10(b) period without change. The Board found that each individual application of the unilaterally implemented contract modification did not constitute an independent unfair labor practice. Here, I find that the Union, by Pope, was aware of the Respondent's instructions to stop using the computer equipment and e-mail system for union business outside the 10(b) period. The Respondent's conduct within the 10(b) period was identical to the instructions the Union received on earlier occasions in 1999, that it was to cease using the Employer's computer equipment and e-mail system to conduct union business. Under these circumstances, to permit litigation of the complaint based on a charge filed more than 6 months after the Union had clear and unequivocal notice of the Respondent's policy on the use of its computer equipment and e-mail system, is contrary to the

teachings of Section 10(b) of the Act. Accordingly, I recommend that paragraphs 5 and 6 of the complaint be dismissed.

### 3. THE MERITS

If others disagree on review with my finding concerning the above 10(b) discussion, I will now independently evaluate and provide my thinking on the allegations of paragraphs 5 and 6 of the complaint. For the following reasons, I find that Respondent violated Section 8(a)(1) of the Act by its actions in selectively and disparately informing the RNPA that it was prohibited from utilizing the Employer's computer equipment and e-mail system for union business.

The Board, in adopting the decision of the administrative law judge, in *Adranz, ABB Daimler-Bentz*, 331 NLRB 291 (2000), addressed a similar e-mail rule.

The Board held that it is well established that there is no statutory right of an employee or a union to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982); *Container Corp.*, 244 NLRB 318 (1979). An employer has a right to restrict the use of company bulletin boards. However, that right may not be exercised discriminatorily so as to restrict postings of union materials. *J. C. Penny, Inc.*, 322 NLRB 238 (1996).

Similarly, there is no statutory right of an employee or a union to use an employer's telephone for personal or nonbusiness purposes. However, once an employer grants the privilege of occasional personal use of the telephone during worktime, it may not lawfully exclude union activities as a subject of discussion. *Union Carbide Corp.*, 259 NLRB 974 (1981).

Analogously, Respondent could bar its computer equipment and e-mail system to any personal use by employees. In this case, Respondent did permit e-mails of a personal nature, notwithstanding its rule.

In the subject case, which deals with a daily newspaper and its newsroom employees, e-mail has become an important, if not essential, means of communication. The large volume of e-mail messages in evidence reveals that the Employer permits employees to use the system to distribute a wide variety of materials on many subjects. Indeed, the Employer in conjunction with the RNPA has used the e-mail system to jointly sponsor the United Way and March of Dimes Campaign and has worked with the RNPA to finalize proposals for part-time employees (GC Exh. 35 and 36). Furthermore, the e-mail system has been used by management officials and employees to advertise the availability of reunion and band concert tickets, to sign get well cards, to urge employees to consider purchasing candy bars and girl scout cookies, and to congratulate employees on the birth of a child (GC Exh. 26). Likewise, management officials have used the e-mail system to communicate with newsroom employees about events of the Society of Professional Journalists, Virginia Press Women's Organization, and the Organization for Minority Journalists (GC Exhs. 39, 40, 41, and 42).[4] Lastly, I note that when Pope sent an e-mail to all bargaining unit employees regarding proposed changes in their health insurance policy, McDonald reviewed the e-mail and suggested a number of changes to be made. He also complimented Pope on the comprehensive explanation of the changes that was sent to all bargaining unit employees and condoned its issuance.

In spite of the above, the Respondent steadfastly defends its position that the Union cannot use the Employer's

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[4] Respondent argues that its use of the e-mail system for the above third party organizations is authorized and not a breach of its policy because such organizations objectives are related to the Employer's core business (the craft of journalism) unlike the Union. I reject this position and find that, in part, the objectives of the RNPA support activities related to the Employer. In this regard, the RNPA establishes just wages for employees, promotes training and upward mobility to enhance the quality of the newspaper and serves as a partner with the Employer in many worthwhile charitable events.

computer equipment or e-mail system to distribute any union literature or notice of RNPA events (GC Exh. 14). I find that this prohibition clearly is discriminatory. Thus, I conclude that having permitted the routine use of the e-mail system for management representatives and employees to distribute a wide variety of material that has little or any relevance to the Employer's business, the Respondent discriminates against the Union when it denies it access to its computer equipment and e-mail system to distribute union literature and RNPA notices. Therefore, I find that the Respondent violated Section 8(a)(1) of the Act by selectively and disparately prohibiting the RNPA from utilizing its computer equipment and e-mail system as alleged in paragraphs 5 and 6 of the complaint. *E. I. Du Pont & Co.*, 311 NLRB 893, 919 (1993).

### *C. The 8(a)(1) and (5) Violations*

#### 1. ARBITRATION PROCEEDINGS

The General Counsel alleges in paragraph 10 of the complaint that Respondent unilaterally changed a past practice of paying the wages of union representatives who participate in arbitration proceedings without notice to and affording the RNPA an opportunity to bargain over this conduct and the effects of this conduct.

The RNPA, by Pope, filed a grievance on July 1, 1999, over the discharge of bargaining unit employee Pam Mastropaolo (GC Exh. 25). Under the parties' then existing collective-bargaining agreement a number of meetings were held in order to gather information about the grievance and attempt an amicable resolution of the matter (GC Exh. 8). Pope was paid his regular wages while he participated in these grievance meetings.

On March 2, 2000, Pope participated as a representative of the RNPA, in the arbitration of the Mastropaolo discharge grievance. The arbitration lasted all day and he entered on his timesheet for that week the time of arrival at the arbitration and the time that he left. Several days after the arbitration, he was called into the office of Metro Editor

Andy Taylor with Seals in attendance and informed that he would not be paid for the time that he attended the arbitration proceeding. Pope indicated to Taylor and Seals that he was always paid for union business on Employer time. Seals agreed with that assessment but informed Pope that this was for his participation in an arbitration proceeding and this was different. Seals gave Pope the option of taking a vacation day or working the extra hours to make up for the time spent in the arbitration proceeding. Pope opted to take a vacation day and the General Counsel seeks reimbursement as part of the remedy in this matter. Respondent followed up this oral advice with a letter to Pope dated July 31, 2000 (GC Exh. 11).

The General Counsel argues that because Pope was paid for his participation in the Mastropaolo grievance meetings, a logical extension of the parties' collective-bargaining agreement is to also reimburse him for his participation in the arbitration proceeding. For the following reasons, I reject the General Counsel's argument to this effect.

The General Counsel did not rebut McDonald's testimony that the Mastropaolo arbitration proceeding was the first one that the parties participated in during the RNPA's representative status since 1969. Thus, there is no past practice established entitling union representatives to reimbursement for their participation in an arbitration proceeding. Moreover, Pope concedes and the then-existing collective-bargaining agreement confirms, that there is no provision that addresses pay for union representatives for union business including participation in arbitration proceedings (R. Exh. 1 and GC Exh. 8). I also note that section X of that agreement has separate paragraphs that address meetings for the purpose of attempting to settle questions arising from the application of the agreement and the mechanism to initiate an arbitration proceeding (see sec. X, items 1 and 2). Accordingly, I find that since there was no past practice for the reimbursement of union representatives for their participation in arbitration

proceedings, the Respondent did not engage in any unilateral changes of wages, hours, or working conditions. Thus, the Respondent was under no obligation to engage in negotiations with the RNPA with respect to this conduct and the effects of this conduct. Therefore, I recommend that paragraph 10 of the complaint be dismissed and find that the Respondent did not violate Section 8(a)(1) and (5) of the Act.

### 2. NEGOTIATION PROCEEDINGS

The General Counsel alleges in paragraph 11 of the complaint that Respondent unilaterally changed a past practice of paying the wages of union representatives who participate in negotiation sessions without notice to and affording the RNPA an opportunity to bargain over this conduct and the effects of this conduct.

The Respondent argues that it is under no obligation to pay anyone for time not worked and believes that it is the Union's responsibility to make such payments for its negotiators since it is an investment in the bargaining process. Additionally, the Respondent asserts that all employee union negotiators received a full day's pay for the time spent in negotiations and no employee lost any wages on days that they spent in negotiations with Respondent representatives.

Respondent stipulated that since at least 1995, there was a past practice to pay bargaining unit employee union negotiators for time spent in negotiations with Employer representatives. This is consistent with the credited testimony of former union negotiators, Smith and Pope.

At the commencement of the July 13, 2000 initial collective-bargaining session for the parties' successor agreement, McDonald apprised the union negotiators that they would no longer be paid for time spent while negotiating with Respondent representatives. He said that, "if I had known that they were paying you, I would have stopped it a long time ago." McDonald further stated that

the union negotiators would be paid for negotiating today, but from here on out you are not getting paid.[5] By letter dated July 31, 2000, McDonald confirmed his earlier oral notification to the union negotiators that they no longer would be paid for participation in negotiations with Respondent representatives (GC Exh. 11).

The Supreme Court has held in *NLRB v. Katz*, 369 U.S. 736 (1962), that an employer must first notify and bargain with a union before a change in a mandatory subject of bargaining takes effect. Here, I find that the past practice of paying union negotiators for time spent at the bargaining table with Respondent representatives ripened into a term and condition of employment that could not be changed without prior notice and bargaining with the RNPA.[6] Respondent, however, refuses to acknowledge that the past practice of paying union negotiators is a mandatory subject of bargaining. Rather, it argues it is under no obligation to pay anyone for time not worked.[7]

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[5] Pope credibly testified, and Respondent does not dispute, that union negotiators were paid for their time at the bargaining table on September 11, 2000. For any collective-bargaining sessions after that date, union negotiators were not paid for their time spent at the bargaining table.

[6] The parties' then effective collective-bargaining agreement is silent on the issue of payment of union negotiators for time spent at the bargaining table (GC Exh. 8).

[7] The Respondent's argument that because union negotiators did not lose any pay for the time spent in negotiations, the Act has not been violated is rejected for the following reasons. Pope succinctly described the change in past practice both before and after July 13, 2000. Prior to the announced change, if union negotiators spent 2 hours in negotiations, it was only necessary for them to work an additional 6 hours in order to receive 8 hours pay for that day. After the change, if union negotiators spent 2 hours at the bargaining table, it was necessary for them to work an additional 8 hours to receive a full-days pay. Thus, before the announced change, employee union negotiators only worked 8 hours on the day of negotiations while after the change it was necessary to work 10 hours to earn a full-days pay. Under these circumstances, I find that a change in a mandatory subject of bargaining occurred when McDonald orally announced on July 13, 2000, that union negotiators would no longer be paid for time spent at negotiation sessions.

I conclude that the July 13, 2000 announced change in the past practice of paying union negotiators for time spent at the bargaining table is similar to the Board's holding in *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987). In that case, the Board found that the unilateral modification of an employee purchase program was found to be a mandatory subject of bargaining and the refusal to negotiate about the changes was violative of the Act. Under these circumstances, and particularly noting that the Respondent unilaterally changed the past practice of paying RNPA union negotiators for time spent in bargaining sessions without negotiating, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act. See *Axelson, Inc.*, 234 NLRB 414, 415 (1978), enfd. 599 F.2d 91 (5th Cir. 1979).

### 3. UNILATERAL CHANGE AND THE REFUSAL TO PROVIDE INFORMATION

#### *a. Facts*

The General Counsel alleges in paragraph 12 of the complaint that on or about July 31, Respondent unilaterally discontinued the practice of paying the Christmas or holiday bonus to employees in the RNPA bargaining unit. The General Counsel further alleges in paragraphs 15 and 17 of the complaint that the RNPA requested certain financial information to verify the Respondent's position that it was unable to pay a Christmas or holiday bonus in 2001, but Respondent refused to provide such information.

The Respondent stipulated that it has paid a Christmas or holiday bonus to employees represented by the RNPA from 1960 through 2000. It concedes, however, that it did not pay a Christmas or holiday bonus to employees represented by the RNPA in December 2001. The record confirms that the Christmas or holiday bonus is normally paid in the second week of December, and Federal, State, and social security taxes are withheld from each employee's check. The bonus is the equivalent of one week's pay and increases proportionately with employee increases in salary. The

Christmas or holiday bonus is a budgeted item and is reported on the employee's W-2 form for income tax purposes. Thus, I conclude that the Christmas or holiday bonus relates to wages, hours, and other terms and conditions of employment of the RNPA unit and is a mandatory subject for the purposes of collective bargaining. *Radio Electric Service Co.*, 278 NLRB 531 (1986).

On July 31, McDonald along with Larsen notified Union President Williams by telephone that the 2001 Christmas or holiday bonus would not be paid to members of the RNPA bargaining unit because of poor economic conditions.[8] Additionally, McDonald apprised Williams that restrictions on earning overtime pay, travel, and hiring would be imposed during the remainder of 2001. During the telephone conversation, McDonald acknowledged that the cancellation of the bonus was a bargainable issue and the Respondent was willing to negotiate. McDonald met with Williams later that day and provided him a copy of the draft letter that Chairman and CEO Bryan would be sending to all employees (GC Exh. 31). Bryan, in the final version of the letter that was sent to all employees on July 31, explained that due to "the worst advertising downturn in a decade, the Employer would be unable to pay a Christmas or Holiday bonus this year" (GC Exh. 16).[9] On August 2, the Union responded to Bryan's

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[8] The Christmas or holiday bonus cancellation for 2001 applied to all union and nonunion employees of Respondent.

[9] The July 31 letter states in pertinent part:

> As we all well know, we are in the midst of the worst advertising downturn in a decade, caused by a weak economy. This is having a devastating effect on the financial performance of all media companies. In response to weak business conditions, the companies in our industry are implementing aggressive cost-cutting measures in order to maintain cash flow during this difficult time. Many have had significant employee layoffs. Thus far, this has not been the case at Media General, and we hope to continue to avoid a major layoff. We must, however, find other ways to reduce costs further. Unfortunately, the revenue outlook for the rest of this year is bleak. Opinion in our industry is divided on whether the advertising downturn is at bottom, but there certainly is no evidence of an upturn. Our company faces a very

letter agreeing that the Christmas bonus was a bargainable matter and indicating a willingness to meet with the Respondent on this issue (GC Exh. 17). In the letter, however, the Union stated that before such a meeting took place, it was necessary to obtain specific financial information from Respondent. Such information requested included books and records so it could determine whether there is a "cash flow" problem and to verify that the newspaper is "weak" when it comes to revenues. The Union reiterated that after it examines the information, it would meet with the Respondent to engage in meaningful discussions over the elimination of the Christmas or holiday bonus.

By letter dated August 7, Respondent replied to the RNPA's request for information (GC Exh. 18). The Respondent stated that since the Union relied on statements in the Bryan July 31 letter and assumed that the Employer

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difficult second half of the year. The broadcast division will not have the revenues it had last year from political campaigns and the Olympics, and our newspaper side is also weak. In the absence of new revenue possibilities, we are driven to look at the cost side of the business to improve overall performance. We have already instituted strict hiring constraints and reduced overtime. We have restricted travel and entertainment and the use of outside consultants. We have eliminated many marketing and promotion expenditures. Capital expenditures have been restricted to those that produce quick positive cash impact. Many of the initiatives focused on the cost side of the business have been in place for several months. These initiatives have been helpful in addressing the business requirement to maintain a strong cash flow. However, as we look to the remaining part of the year we find that our current initiatives will not be enough to offset the projected decline in advertising revenues. As a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year to employees who many have been eligible for one. We will also implement a new Voluntary Unpaid Leave Policy for non-represented employees, and your Human Resources Department will announce the details shortly. Our entire management team very much regrets having to take these actions, but we have no choice based on the business environment. While this may appear drastic within the culture of our company, it is far less severe than measures already taken by many of our peer companies.

was unable to pay the Christmas or holiday bonus, the Respondent was officially retracting that statement. The Respondent informed the RNPA that it is not unable to pay the bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace. While the Respondent informed the RNPA that it had no legal obligation to provide the requested information, it reiterated its willingness to bargain over the elimination of the Christmas or holiday bonus. The Respondent, while not providing any financial books or records responsive to the information request, did give the RNPA copies of the current annual report and 10(k) report provided to the Securities and Exchange Commission on or about August 7.

*b. Analysis*

It is well settled that an employer must disclose financial information only when the employer has indicated an inability to pay. In determining whether an employer is claiming an inability to pay, the Board and the U.S. Courts of Appeals distinguish an employer's claim that it "can not pay" from an employer's claims that it "will not pay." When an employer states that it can not pay, it must furnish information to substantiate the claim, if asked to do so by the union. Where an employer states that it will not pay, the union must take other avenues to gather the information.

The Board has held that information about the financial condition of the employer is not presumptively relevant. *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). As stated in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997):

> Although the relevance of information concerning the terms and conditions of employment is presumed, see *Ohio Power Co.*, 216 NLRB 987 (1975), no such presumption applies to an employer's information regarding its financial

> structure and condition, and a union must demonstrate that any requested financial information Is relevant to the negotiations in order to require the *employer to turn it over. See International Woodworkers v. NLRB*, 263 F.2d 483, 485 (D.C. Cir. 1959).

In order to meet its burden of proving relevance, the union must establish that the employer has claimed that it is financially unable to pay the amounts proposed by the union in negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

In *Nielsen Lithographing*, the Board defined the "inability to pay," which triggers the employer's obligation to provide requested financial information. The Board said:

> [A]n employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation. [Footnote omitted.]
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> . . . .
>
> By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay.

305 NLRB at 700.

In enforcing the Board's *Nielsen* decision, the Seventh Circuit elaborated on the term "inability to pay." The court noted that *Nielsen* sought concessions in bargaining to reduce its labor costs. However, the court said that:

> [Nielsen] did not base the demand on any claim that it was in financial jeopardy, strapped for cash, broke or about to go broke, unprofitable, or otherwise unable to pay the existing level of wages and fringe benefits
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> . . . .
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> If the employer claims that it cannot afford to pay a higher wage or, as here, the existing wage, the union is

> entitled to demand substantiation in the employer's financial records. . . . But there isn't a hint of that here. . . . All that Nielsen was claiming was that if it didn't do anything about its labor costs it would continue to lose business and lay off workers. It didn't claim that it was in any financial trouble.

In subsequent cases, the Board and courts have made clear that only when a present inability to pay has been asserted will the union be entitled to requested financial information from the employer. For example, in *Shell Co.*, 313 NLRB 133 (1993), the Board found that an employer's claims that conditions were "very bad[ ]," "critical," a "matter of survival," and that "we need your help, your assistance, because of this condition," were tantamount to a claim of present inability to pay, and triggered the obligation to provide requested financial information. Conversely, where the employer merely states that it is "having trouble staying afloat," the "well has run dry," or claims only general economic difficulties or business losses" as the reason for its position, the employer may lawfully refuse to hand over financial information." *Nielsen*, 305 NLRB at 700, supra. Nor will an employer be required to open its books to the union on the basis of the employer's contentions that "its financial condition is bleak, or that it is suffering losses, or encountering economic difficulties." *Wisconsin Steel Industries*, 318 NLRB 212, 224 (1995).

When determining whether an employer is claiming a present inability to pay in bargaining, the Board looks not at isolated words, but at the record as a whole. Finally, even where an employer initially claims an inability to pay, if it subsequently makes clear that it is neither claiming poverty nor a present inability to pay, the Board will not require the employer to open its books to the union. See *Central Management Co.*, 314 NLRB 763, 768–769 (1994).

In the subject case, the Union's bases its argument that the Respondent is obligated to provide financial data on a

portion of the Bryan July 31 letter (GC Exh. 16). In this regard, the Union's focus is on the statement, "As a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year to employees who may have been eligible for one."

While there is no question that the words "unable to pay" are contained in the letter, it must be considered together and in context. In examining the July 31 letter, it specifically points out that the weak economy is having a devastating effect on the financial performance of all media companies and those employers are implementing aggressive cost-cutting measures to maintain cash flow during this difficult time. Respondent notes that while competitors have been forced to layoff employees, this has not been the case here and it hopes to avoid a major layoff. In order to avoid such layoffs, it states it must find other ways to reduce costs further. The Respondent, in order to reduce costs, informed all employees including those represented by the RNPA that it must improve overall performance and it has already instituted strict hiring constraints, reduced overtime, restricted travel and entertainment and the use of outside consultants.

Based on my evaluation of the July 31 letter in its entirety, I find that its content reflects and conveys to employees that the Respondent was losing money. However, there is a clear distinction between "losing money" and "an inability to pay." An employer can be losing money and yet have sufficient assets to weather the storm. In the subject case, the Respondent may well have been "losing money," but it never claimed that it had insufficient assets to meet the Union's demands for the payment of the Christmas or holiday bonus.[10]

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[10] In this regard, the RNPA knew or should have known that Respondent was not pleading poverty nor was it on the verge of filing bankruptcy. Indeed, the RNPA was provided the annual and 10(k) report on or about August 7 that shows that the Respondent had sufficient assets to pay the Christmas or holiday bonus. Likewise, the RNPA admitted

Under these circumstances, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to provide the requested information.

Even assuming, arguendo, that certain conduct by the Respondent could be construed as an implicit claim of "inability to pay," the Respondent subsequently made it clear, in its August 7 letter to the RNPA, that it had not been and was not asserting such a claim (GC Exh. 18). Thus, the Respondent expressly stated that "Media General has not indicated that it is unable to pay the bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace. Because the revenue outlook for the rest of the year is bleak, Media General has chosen as a discretionary matter to introduce some institutional belt-tightening."

Based on the forgoing, I find that this represents an additional reason that the Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to provide the requested information.

In regard to the General Counsel's additional assertion that the Respondent violated Section 8(a)(1) and (5) when it unilaterally discontinued the practice of paying the Christmas or holiday bonus, I find that the Respondent did not violate the Act for the following reasons.

The RNPA admits that McDonald during their telephone conversation on July 31, agreed that the discontinuance of the Christmas bonus was a negotiable issue and it wanted to meet with the Union. By letter dated August 2, and admitted by Williams, the RNPA agreed to meet but conditioned the meeting on the receipt of specific financial information. The RNPA stated, "After our examination, we will then be able

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that it was aware and received Respondent's July 17 press release reporting second-quarter results that showed net income of $9.6 million, or 39 cents per diluted share (R. Exhs. 2 and 3). Lastly, the RNPA, as a stockholder along with its individual employee members, was aware that the Respondent on July 26 declared a quarterly dividend of 17 cents per share payable on Sept. 15 (R. Exh. 4).

to meet with you so that we can have meaningful discussions of these financial matters and their impact, if any" (GC Exh. 17).

Because the RNPA conditioned any meeting to discuss the discontinuance of the Christmas bonus on the receipt of information, no separate negotiation sessions took place between the parties on this issue.[11]

Since the RNPA sat on its rights and conditioned bargaining on the receipt of financial information that I have determined was not necessary to provide to the Union, I find that the Respondent did not violate the Act. Therefore, when the Respondent discontinued the practice of paying the Christmas or holiday bonus in December 2001, and the Union did not engage in negotiations after Respondent's prior notification and willingness to negotiate, Section 8(a)(1) and (5) of the Act was not violated.

Based on the foregoing, I recommend that paragraphs 12, 15, and 17 of the complaint be dismissed.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[11] There is a wide disparity and difference of opinion on whether discussions took place on the discontinuance of the Christmas bonus. In this regard, the General Counsel and the RNPA argue that no independent discussions occurred between the parties on this issue and their collective-bargaining notes of the August 3, 8, and 9 negotiation sessions conclusively support this assertion. Conversely, the Respondent argues that during the August 8 bargaining session that led to the parties' August 19 successor agreement, the RNPA raised the Christmas bonus issue. Indeed, the Respondent argues that the Union's chief negotiator asserted during the August 8 bargaining session that he refused to negotiate about the Christmas bonus issue. He further stated that the Union had no obligation to bargain about the issue and the Respondent should in no manner construe the fact that a discussion at the bargaining table regarding the Christmas bonus had occurred, as the Union actually negotiating about the issue. In light of my conclusion above, I do not find it necessary to resolve this credibility resolution.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by unilaterally refusing to pay wages of employee members of the RNPA Negotiating Committee for time spent in bargaining sessions with Respondent representatives.

4. Respondent did not engage in any other unfair labor practices as alleged in the complaint.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must make employee members of the RNPA negotiating committee whole for any loss of earnings and other benefits, for time spent in bargaining sessions with Respondent representatives as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

## ORDER

The Respondent, Richmond Times-Dispatch, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Unilaterally changing wages, hours, and working conditions by failing and refusing to negotiate and pay wages of employee members of the RNPA negotiating committee for time spent in bargaining sessions with Respondent representatives.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employee members of the RNPA negotiating committee whole for any loss of earnings and other benefits in the manner set forth in the remedy section of the decision.

(b) Rescind the changes in the wages and work schedules of employee members of the RNPA negotiating committee, and restore all terms and conditions of employment as they existed prior to the change.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Richmond, Virginia, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

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[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 4, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT refuse to bargain in good faith with the RNPA by implementing unilateral changes in employees' wages, work schedules, and other terms and conditions of employment without bargaining to agreement or lawful impasse.

WE WILL rescind the changes in the wages and work schedules of employee members of the RNPA negotiating committee, and restore all terms and conditions of employment as they existed prior to the change.

WE WILL make employee members of the RNPA negotiating committee whole for any loss of earnings and other benefits resulting from their time spent in bargaining sessions with Employer representatives, with interest.

MEDIA GENERAL OPERATIONS, INC., D/B/A
RICHMOND TIMES-DISPATCH